JD–45–12
Detroit, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BLUE CROSS BLUE SHIELD OF MICHIGAN

and Case 7-CA-73807

ANISE WIDEMAN, An Individual

Patricia A. Fedewa, Esq., of Detroit, MI,
for the Acting General Counsel.
Theodore R. Opperwall, Esq., of Birmingham, MI,
and *Lori Keen Adamcheski, Esq.,* of Detroit, MI,
for the Respondent-Employer.

DECISION

Statement of the Case

Bruce D. Rosenstein, Administrative Law Judge. This case was tried before me on June 27 and 28, 2012,[1] in Detroit, Michigan, pursuant to a Complaint and Notice of Hearing issued by the Regional Director for Region 7 of the National Labor Relations Board (the Board). The complaint, based upon a charge filed on February 3, by Anise Wideman (the Charging Party or Wideman), alleges that Blue Cross Blue Shield of Michigan (the Respondent or Employer), has engaged in certain violations of Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that they had committed any violations of the Act.

Issues

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act when it terminated the employment of employees Wideman and Shannon Rosado for engaging in protected concerted activities and failed to offer them other available jobs.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

[1] All dates are in 2012 unless otherwise indicated.

Findings of Fact

I. Jurisdiction

Respondent, a non-profit corporation, with offices and places of business in various Michigan cities including Detroit and Southfield, has been engaged in the provision of health care insurance. Respondent, in conducting its business operations derived gross revenues in excess of $500,000 and purchased and received at its Michigan facilities goods and materials valued in excess of $50,000 directly from points outside the State of Michigan. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

The 8(a)(1) Allegations

The Acting General Counsel alleges in paragraphs 6 through 8 of the complaint that about late January 2012, Respondent's employees, the Charging Party and Rosado, concertedly complained to Respondent regarding their shared working conditions, by mutually supporting Rosado's claim, lodged with Respondent's Human Resources Department, that a co-worker harassed them and that Respondent's previous responses to such complaints were inadequate. On January 31, Respondent terminated the employment of the Charging Party and Rosado, and since January 31, Respondent has failed and refused to offer them other available jobs.

The Respondent defends its conduct by asserting that Wideman and Rosado were temporary employees whose job assignments ended on January 31, and had no guarantee of permanent or continued employment.

Background and Facts

At all material times, Curt Schoenjahn held the position of Respondent's Director, Small Groups and Special Markets in the Underwriting Department. Jamie Gray, until on or about October 4, 2010, served as the Supervisor of the Small Groups Underwriting Department and Karen Sartor-Diehl assumed that position after October 4, 2010. Tiffany Wynne holds the position of Supervisory Unit Lead in the Small Groups Underwriting Department and reports to Sartor-Diehl. Tiffany Hunter serves as the Senior Representative in Respondent's Human Resources Department.

Employee Sabrina Breedlove holds the position of a program analyst, a non supervisory-non bargaining unit position, in the Small Groups Underwriting Department.

Respondent and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) are parties to a Master Collective Bargaining Agreement whose terms and conditions have been extended to cover events related to the subject case (GC Exh. 8). The agreement covers full-time permanent employees employed by the Respondent and in certain circumstances, at Section 8, covers the terms and conditions of temporary employees who are hired by the Respondent to temporarily supplement the workforce or to cover temporary time lost by regular employees. Temporary employees, by joint agreement of the parties, normally work for a fixed period of 90 or more days and if mutually agreed may be extended beyond that set deadline due to the particular circumstances of the situation.

Wideman and Rosado were hired in July 2009 by Robert Half Accounttemps, and were placed with the Respondent to perform work under a Federal Government Mental Health Parity Contract. The Staffing Agency paid their salary but both employees received work assignments and direction from Gray.

In August 2010, because of an increased workload due to Health Care Reform Legislation (Obama Care), and with the concurrence of the UAW, Wideman and Rosado were directly hired by the Respondent and were converted to full-time corporate temporary employees. Both employees continued to be supervised by Gray at the Southfield facility until on or about October 4, 2010, when Sartor-Diehl became there supervisor, and they worked as rate control specialists.

Wideman and Rosado, along with other corporate temporary employees[2] continued to work at the Southfield location until May 11, 2011, when the rating control department was transferred to downtown Detroit, Michigan.

On August 18, 2011, the Respondent and the UAW met to discuss the status of the Obama Care program and whether any more extensions for the corporate temporary employees could be mutually agreed upon. The UAW was adamant that the program should not be extended beyond the peak period of September to December 2011, when case intake was at its highest level. Since case intake and processing tended to taper off after January 1 of each year, keeping the temporary employees in a work status would take work away from bargaining unit full-time employees who performed many of the same functions as the temporary employees. The meeting concluded with an agreement between the parties that the corporate temporary employees would continue to be employed through January 31, but would be removed from the rolls on that date.

In early November 2011, Respondent's Managers informed the temporary corporate employees in the rate control department that there would be no further extensions of their temporary appointments, and the last day of employment would be January 31. Both Schoenjahn and Sartor-Diehl exhorted the temporary employees including Wideman and Rosado, to complete and hand in resumes, and to consider taking the customer service representative test (CSR) that was required to qualify for any available permanent position at the Respondent. Both Wideman and Rosado took and passed the CSR test in mid-January 2012.[3]

The January 31 ending date for the temporary corporate appointments was based on several factors. First, the Obama Care project was winding down and the budget for this initiative was not going to be renewed. Second, the UAW was unyielding in there position that the temporary corporate appointments would not be extended beyond January 31, as it could severely impact the work status of bargaining unit employees by taking away any available work in the Underwriting Department.

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[2] The rate control group consisted of Wideman, Rosado, Sandra MacPherson, Angela Redmon, Joe Rabideau and Monica Singh.

[3] Rosado previously took the CSR test on or about April 1, 2010, but did not pass. I note the lag time between November 2011, when they both were notified their appointments would end and mid-January 2012 when they took the test, especially in light of their appointments ending on January 31.

In November 2011, Rabideau applied for and was competitively selected for a program assistant position, a full-time non supervisory-non bargaining unit position. In mid-January 2012, prior to the scheduled January 31 ending date of the temporary corporate appointments, Singh left the employ of the Respondent. Accordingly, there were four remaining employees in the rate control group under the supervision of Sartor-Diehl and Wynne (Wideman, Rosado, MacPherson, and Redmon).

Anise Wideman

Wideman had several interactions with co-worker Breedlove. The first encounter occurred in June 2010, when Wideman asserted that Breedlove was rude and disrespectful by throwing work assignments on her desk. Wideman discussed the matter with Gray and shortly thereafter, the conduct ceased.

The second situation took place in August 2011. Wideman sent an e-mail to Sartor-Diehl complaining about Breedlove's actions of yelling at her and throwing work assignments on her desk (GC Exh. 15). While Sartor-Diehl did not directly reply to the e-mail, she spoke with both individuals and counseled them to be more respectful of each others work related needs. In order to relieve some of the friction, Sartor-Diehl instructed Breedlove to send out e-mail requests for group status reports earlier in the day so Wideman and other corporate temporary employees had more lead time to gather information and provide timely responses to Breedlove. This would enable Breedlove to timely acquire the required information in order to report to management officials during her regularly scheduled 8:30 a.m. conference calls that were held three times each week.

Wideman acknowledged that after she sent the August 2011 e-mail and Sartor-Diehl initiated the work related action regarding Breedlove, she did not individually initiate any additional complaints either orally or in writing with any management or supervisory official nor did she file a formal harassment complaint against any co-worker with Respondent's Human Resources Department.

On January 30, Wideman was instructed to report to the Human Resources Department for a meeting with Hunter. The purpose of this meeting was to provide information concerning the harassment complaint that Rosado had individually filed against Breedlove. Hunter's notes of that discussion were introduced into the record (GC Exh. 4).

On January 31, around 4:30 p.m., Sartor-Diehl instructed Wideman to proceed to the Human Resources Department because her temporary appointment was ending that day. Upon arriving at Human Resources, Wideman was informed by Hunter that her temporary appointment officially ended and her employment was being terminated. Wideman handed in her credentials and left the facility.

On February 3, Wideman filed the subject unfair labor practice charge that alleges the Respondent failed to convert her and Rosado to regular employees, and on January 31 indefinitely laid off both employees in retaliation for their union and/or protected concerted activities.[4]

[4] I note that the Acting General Counsel's complaint allegations do not rely on any union activities undertaken by Wideman or Rosado. Indeed, it is undisputed that neither Wideman nor Rosado were members of the UAW bargaining unit, and the record does not contain any evidence that either employee was terminated for engaging in union activities.

Shannon Rosado

On October 13, 2010, Rosado sent an e-mail to Sartor-Diehl requesting a meeting to be scheduled with Breedlove to discuss ongoing personal issues that have occurred between them (GC Exh. 10). Sartor-Diehl responded, and stated she would try and find some early morning free time.

Sartor-Diehl held a meeting with Rosado and Breedlove to address the allegations raised in the e-mail. During the meeting, a discussion ensued in which Sartor-Diehl counseled the employees regarding decorum in the workplace and urged them to resolve there differences. Sartor-Diehl observed that things seemed to quiet down between them and no further concerns regarding Breedlove were brought to her attention until January 23, a period in excess of one year.

Prior to leaving work on January 23, Rosado approached Sartor-Diehl and stated she wanted to tell her something. After hesitating somewhat, Rosado ultimately informed Sartor-Diehl that she heard that Breedlove had made the comment that "Shannon is not the type of girl you bring home to your Mother." Sartor-Diehl asked Rosado whether she had talked to Breedlove about the matter. Rosado said, "I can't." Sartor-Diehl then asked Rosado "Who told you this?" Rosado refused to tell Sartor-Diehl who informed her about Breedlove's comment. Sartor-Diehl told Rosado that she would talk to Breedlove about the issue.

The next day, January 24 (Tuesday), Sartor-Diehl attempted to locate Breedlove to discuss Rosado's allegations but learned that she did not come into work that day.

On January 25 (Wednesday), Wynne held a morning meeting (Huddle meeting) with the employees in the rate control group. In part, the meeting was called due to a concern raised by employee Alicia Adams who informed Wynne several days before the Huddle meeting that another employee had been harassing her but she was reluctant to reveal the source.[5] In order to communicate Respondent's position regarding issues of harassment, Wynne impressed upon the employees the importance of congeniality in the work place and to be respectful of your co-workers. Wynne concluded the meeting by telling the employees that if anyone has a problem along these lines they need to let the Respondent know so it can be resolved.

Immediately after the Huddle meeting concluded, Rosado approached Wynne and informed her that Breedlove was making unflattering comments about her. Rosado told Wynne that she had previously raised the issue with Sartor-Diehl but felt that nothing had been done about the matter. Since this was the first time that Wynne had heard the allegation, she informed Rosado that a meeting would be scheduled with Sartor-Diehl, as soon as possible, to further discuss her concerns.

A meeting was subsequently held on January 25 with Sartor-Diehl, Wynne and Rosado in attendance. Rosado asserted that Breedlove was talking about her in a negative and unprofessional manner. Sartor-Diehl asked Rosado whether Breedlove had made the negative comments directly to her during work time. Rosado responded, that a third party informed her that Breedlove was making the negative comments about her. Sartor-Diehl then asked Rosado

[5] Adams sent an e-mail to Wynne requesting to move her seat due to the harassment. Adams later informed Wynne that Rosado had been bothering her and she couldn't tolerate it anymore.

the name of the person that informed her about Breedlove's comments but Rosado refused to provide the information. Sartor-Diehl informed Rosado that if she was reluctant to provide the name of the third party, it would be very difficult to correct the problem. Sartor-Diehl further informed Rosado that she had attempted to address the problem by removing Breedlove from passing out work to the employees, and gave that role to Adams in March 2011. Since that time, she informed Rosado that no further problems had been brought to her attention. The meeting ended with Rosado becoming frustrated due in part to her feeling that temporary employees did not have any rights and her impression that nothing had been done about the Breedlove issue that she had previously raised.

Shortly after the meeting ended with Sartor-Diehl and Wynne, Rosado proceeded to the Human Resources Department to file a harassment complaint.[6]

On January 31, Sartor-Diehl accompanied Rosado to the conference room in the Human Resources Department where Hunter formally informed her that she was being let go as her temporary appointment had ended. At the same time, Hunter gave Rosado a letter regarding her harassment complaint that was filed on January 25. In pertinent part, the letter stated that the investigation did not find substantial evidence to support the allegations that she presented in her claim, and no further action would be taken (GC Exh. 12). In response to a question by Rosado regarding the linkage of her temporary appointment ending and the final investigation letter, Hunter responded that they were not related.

Availability of Other Jobs

The Acting General Counsel alleges in paragraph 7(b) of the complaint that the Respondent has failed and refused to offer Wideman and Rosado other available jobs. This allegation is premised on the placement of MacPherson and Redmon in other temporary positions on February 1, while the temporary appointments of Wideman and Rosado were terminated, and they were not considered for those positions.

Facts

The evidence establishes that after the decision had been made to no longer extend the corporate temporary employees appointments beyond January 31, Rick Williams, a Director and counterpart of Schoenjahn inquired whether two of the temporary rate group employees could assist his group with an ongoing project for which funding had recently been acquired. The names of employees MacPherson and Redmon were familiar as they had previously interfaced with a number of his employees on joint projects and had performed in an exceptional manner. After Schoenjahn discussed the request of his counterpart with Sartor-Diehl, she recommended that MacPherson and Redmon be considered for the positions. Sartor-Diehl supported her rationale by comparing and contrasting the overall performance of the four remaining temporary employees under her supervision.

With respect to Rosado, Sartor-Diehl characterized her overall performance as poor based on her lack of focus in performing her assigned duties, spending large amounts of work

[6] The Acting General Counsel did not introduce any formal written harassment complaint filed by Rosado against Breedlove. The meeting notes of Hunter stated in pertinent part that "Shannon requested to meet with me to discuss a concern that she had with a NBU employee by the name of Sabrina Breedlove" (GC Exh. 2). Rosado did not assert in her complaint that she was filing it on behalf of Wideman or any other co-worker.

time talking and texting on her cell phone, having a poor attendance record by routinely coming in late for work, and frequently entertaining visitors at her desk that caused a disruption in her work assignments. Sartor-Diehl also noted, when comparing the four employees, that Rosado had the lowest number of cases processed and the highest overage turnaround days.

Concerning Wideman, Sartor-Diehl noted that her work product was generally good however she had a problem following proper office protocol. In this regard, Wideman on a number of occasions refused to follow direct orders from her supervisors and proceeded as she saw fit. While her case processing and average turnaround days were good, they did not equal those of MacPherson or Redmon.

Sartor-Diehl evaluated MacPherson and Redmon as outstanding and excellent performers respectively, with MacPherson being detailed oriented and Redmon handling special projects in an exemplary manner. MacPherson had the highest case processing rate in the group with Redmon handling the next highest number of cases, both of their statistics exceeding those of Wideman and Rosado (R Exh. 4).[7]

Discussion

The record establishes that there were only two available corporate temporary positions in Williams's group, and based on an assessment of their work performance, MacPherson and Redmon were selected for the positions.

Since the positions in the other work group were not considered bargaining unit work, the UAW did not object to the temporary appointments continuing beyond January 31.

Based on the forgoing discussion, I find that when comparing the work performance of Wideman and Rosado with that of MacPherson and Redmon, it conclusively establishes that the later two employees were the superior performers. Thus, the decision by Respondent to select them for the two available corporate temporary positions was based on sound business principles and in no way was influenced by any protected activities undertaken by Wideman or Rosado. I further conclude the same decision would have been made even if Wideman and Rosado had engaged in concerted activities that will be addressed more thoroughly below.

Under these circumstances, I find that the Acting General Counsel has not established a violation of Section 8(a)(1) of the Act as alleged in paragraph 7(b) of the complaint.

Legal Analysis and Conclusions

The protected nature of employee's efforts to protest Respondent's actions concerning wages, hours and working conditions has long been recognized by the Board who has held that similar conduct comes within the guarantees of Section 7 of the Act. See *Joseph DeRairo, DMD, P.A.* 283 NLRB 592 (1987). The Board has also held in *Mike Yurosek & Sons, Inc.,* 306 NLRB 1037, 1038 (1992), that "individual action is concerted where the evidence supports a finding that the concerns expressed by the individual are [sic] logical outgrowth of the concerns expressed by the group."

In its lead case on concerted activity, *Myers Industries,* 268 NLRB 493, 497 (1984)

[7] Wynne testified consistently with Sartor-Diehl's assessment of the four temporary employees work performance in the rate control group.

(*Myers I),* remanded sub nom. *Prill v. NLRB,* 755 F.2d 941 (D.C. Cir. 1985), cert denied 474 U.S. 948 (1985), the Board explained that "to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." Following a remand from the United States Court of Appeals for the District of Columbia Circuit, the Board reiterated that standard but clarified that it "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Myers Industries,* 281 NLRB 882, 887 (1986) (*Myers II,* enfd. sub nom. *Prill v NLRB,* 835 F. 2d 1481 (C.C. Cir. 1987), cert denied 487 U.S. 1205 (1988).

Applying these principles, the Board has consistently found activity concerted when, in front of their coworkers, single employees protest changes to employment terms common to all employees. See, e.g., *Chromalloy Gas Turbine Co.,* 331 NLRB 858, 863 (2000), enfd. 262 F.3d 184, 190 (2d Cir. 2001); *Whittaker corp.,* 289 NLRB 933, 934 (1988). The concerted nature of an employee's protest may (but need not) be revealed by evidence that the employee used terms like "us" or "we" when voicing complaints even when the employee had not solicited coworkers' views before hand.

In *Wright Line,* 251 NLRB 1083 (1980), enfd, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399-403 (1993). In *Manno Electric,* 321 NLRB 278 fn. 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

The underpinning of Rosado's harassment complaint was first raised with Sartor-Diehl as she was leaving work on January 23. In this regard, Rosado informed Sartor-Diehl that a third party had informed her that Breedlove was making unflattering and negative comments about her (Shannon's not the type of girl you bring home to your Mother) but was reluctant to reveal the source of the comments. On January 25, after the Huddle meeting, Rosado also informed Wynne about the unflattering comments. In a subsequent meeting with Sartor-Diehl and Wynne on January 25, Rosado again refused to reveal the source of the third party comments. The harassment complaint was then officially lodged with Hunter in the Human Resources Department (GC Exh. 2). Hunter's interview notes specifically reveal that Rosado filed the complaint based on a "personal" concern that she had with Breedlove. No mention of any other employee, who also had this identical or general concern, was made by Rosado when she filed the complaint with Hunter. I am hard pressed to find that the negative and unflattering comments that may or may not have been directed at Rosado (she refused to reveal the source and thus any comments were hearsay) raise issues of employment terms common to all employees. Rather I find that Rosado, when she met with Hunter on January 25, raised an issue solely pertinent to her, and did not use terms like "us" or "we" when voicing the complaint.

Thus, I find that not only was the matter not a term and condition of employment but the underlying complaint was not concerted.[8]

Additionally, for the following reasons and in agreement with Respondent's comprehensive investigation, I find that the complaint filed by Rosado was unsubstantiated and lacked merit (GC Exh. 2-7 and 12).

First, it is noted that Rosado refused to reveal to Sartor-Diehl on two separate occasions, the source of the third party comments that alleged Breedlove had been making unflattering and negative comments about her or whether the comments were make at the work site. Thus, it was impossible for Sartor-Diehl to press forward with any type of investigation as the complaint was nothing more then hearsay. It is also noted that Breedlove apologized to Rosado for any actions she took that might have offended her. Second, the record confirms that Sartor-Diehl and Wynne were sympathetic and took immediate action whenever Wideman or Rosado complained about Breedlove's attitude by speaking to all parties concerned and removing the assignment of cases from Breedlove that seemed to be causing the friction between them. Third, I conclude that the underpinnings of the tension between Rosado, Wideman, and Breedlove can be attributed to working in a stressful high volume environment where personalities often clash and actions can be misinterpreted by employees. Thus, I find that the type of complaints lodged against Breedlove by Wideman and Rosado are common occurrences in a work setting that in this case were immediately and substantially addressed by the Respondent.

Lastly, I find that when Rosado and Wideman were informed that their appointments had ended on January 31, and their employment was terminated, it was based on lawful business reasons unrelated at the time to any protected concerted activities they may have engaged in including the filing by Rosado of a harassment complaint with the Human Resources Department.[9] In this regard, I note that there is no dispute that Rosado and Wideman were informed in the November 2011 meeting by the Respondent that their temporary appointments would expire on January 31, and their employment would be terminated on that date. Thus, there was no reason for the Respondent to terminate the employment of Wideman and Rosado pursuant to the filing of the harassment claim that was fully investigated and found no substantial evidence to support the allegations.

For all of the above reasons, I find that the Acting General Counsel has not sustained the allegations in the complaint and, therefore, determine that the Respondent has not violated Section 8(a)(1) of the Act.

[8] The Acting General Counsel's reliance on Holling Press, Inc. 343 NLRB 305 (2004) in the particular circumstances of this case is misplaced. Indeed, the citation in their post hearing brief relies on then Member Liebman's dissenting opinion. The Board majority dismissed the complaint finding that while the conduct was concerted it was not engaged in for the purpose of mutual aid or protection. Moreover, I note in that case, there was a specific request for a co-worker to be a witness. Here, no such request was made by Rosado. Rather, Hunter inquired of Rosado whether she knew of anyone else who experienced problems with Breedlove.

[9] The decision to end the corporate temporary appointments was jointly made by the Respondent and the UAW in August 2011, a period of time prior to the filing of Rosado's harassment claim on January 25.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent did not terminate the employment of Anise Wideman or Shannon Rosado for reasons violative of Section 8(a)(1) of the Act nor did it fail and refuse to offer them other available position by interfering with, restraining, or coercing them in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. September 7, 2012

Bruce D. Rosenstein
Administrative Law Judge

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.